Nos. 16042 and 16228

Consolidated Cases

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING I. BASS, Trustee in Bankruptcy of the Estate of ZIPCO, INC., a corporation, Bankrupt,

Appellant,

vs.

AETNA FACTORS CO., FRUEHAUF TRAILER CO., and COM-AIR PRODUCTS, INC.,

Appellees.

BRIEF OF APPELLEE AETNA FACTORS CO.

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Appellees.

BRIEF OF APPELLEE AETNA FACTORS CO.

Statement of Facts and the Case.

These are consolidated appeals from two orders of the Honorable William C. Mathes, United States District Judge, dated respectively March 28, 1958 [Tr. Case No. 16042, pp. 50-52][1] and September 23, 1958 [Tr. Case No. 16228, pp. 9-10], which held that Aetna Factors Co. (hereinafter referred to as Appellee) had superior rights to certain accounts receivable as against Appellant-Trustee in Bankruptcy. The accounts arose as a result of work performed by the bankrupt for Fruehauf Trailer Company (hereinafter referred to as Fruehauf) and Com-Air Products, Inc. (hereinafter referred to as Com-Air).

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[1]All citations to the record refer to the printed Transcripts of Record on file in the Court of Appeals.

Prior to bankruptcy, the bankrupt sold and factored to Appellee for valuable consideration its Fruehauf and Com-Air accounts receivable. Notice of the intended assignments was duly filed in accordance with Sections 3017 *et seq.* of the California Civil Code. [Tr. Case No. 16042, pp. 55-56.]

The purchase orders giving rise to the Fruehauf accounts contained the following prohibition of assignment: "The contract resulting from the acceptance of this order or any interest thereunder, shall not be assignable nor shall any part of the work be sub-contracted by the vendor without prior written consent of the purchaser." [Tr. Case No. 16042, p. 56.] The Com-Air contract provided against assignment as follows: "This Order may not be assigned or subcontracted in whole or in any part nor may any assignment of any of the money due or to become due hereunder be made by the Vendor without prior written consent of the buyer in each instance." [Tr. Case No. 16042, pp. 56-57.]

When bankruptcy occurred, Fruehauf and Com-Air, relying upon these provisions against assignment, refused to pay Appellee on the accounts theretofore factored by the bankrupt. [Tr. Case No. 16042, p. 57.] The Referee at first held that the transfer in violation of the non-assignability clauses rendered the assignments void, thereby enabling a subsequent attaching creditor of the bankrupt—and accordingly a Trustee in Bankruptcy under Section 70c of the Bankruptcy Act—to obtain rights in the accounts superior to Appellee's title. [Referee's Order of December 23, 1957; Tr. Case No. 16042, pp. 35-43.]

On Appellee's Petition for Review, District Judge Mathes reversed, but remanded the matter for further findings and conclusions as to whether there had been a

fraudulent transfer and whether Appellee and the bankrupt had been engaged in a joint venture. [Order of March 28, 1958; Tr. Case No. 16042, pp. 50-52.] The protective appeal from this order, which constitutes case No. 16042, should be dismissed inasmuch as it involves an attempt to review an interlocutory order made in a "controversy arising in a proceeding in bankruptcy." Bankruptcy Act Sec. 24a, 11 U. S. C. Sec. 47a.

Upon remand, the Referee found and concluded that no fraud existed in the sale of the accounts to Appellee, and that there had not been a joint venture or similar relationship between the bankrupt and Appellee in the factoring transactions. [Tr. Case No. 16042, p. 61.] Accordingly, he followed Judge Mathes' order of March 28, 1958, and ruled that the accounts in question belonged to Appellee. [Referee's Order of April 25, 1958; Tr. Case No. 16042, pp. 53-62.]

This holding was affirmed by Judge Mathes in his Order of September 23, 1958. [Tr. Case No. 16228, pp. 9-10.] The appeal from this latter final decision constitutes case No. 16228 and as to it, appellate jurisdiction exists. Bankruptcy Act Sec. 24a, 11 U. S. C. Sec. 47a.

Statute Involved.

Bankruptcy Act, Section 70c, 11 U. S. C., Sec. 110c:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Issues Presented.

1. Where an account receivable is assigned in violation of a contractual prohibition against assignment, does the transfer nevertheless pass the assignor's rights to the assignee?

2. Is the provision against assignment contained in the Fruehauf contract sufficient to prohibit an assignment of monies coming due thereunder, even as between obligor and assignee?

Outline of Appellee's Argument.

A. Appellee is Entitled to the Fruehauf and Com-Air Accounts Receivable as Against Appellant-Trustee in Bankruptcy.

1. *Under Section 70c of the Bankruptcy Act, the Trustee in Bankruptcy gets only such rights to the accounts as an attaching creditor of the bankrupt might have been able to obtain under California law on the date of bankruptcy.*

2. *Under California law, a creditor of the bankrupt who, on the date of bankruptcy, garnished or levied an attachment on the Fruehauf and Com-Air accounts, would have obtained no greater rights thereto than the bankrupt itself had.*

3. *Regardless of the enforceability of the non-assignment provisions by the obligors, the assignments of the Fruehauf and Com-Air accounts were valid as between the assignor and assignee. Thus, as between the two, the assignments divested the bankrupt of all its rights in the accounts prior to bankruptcy, and transferred same to Appellee.*

B. The Provision Against Assignment of the Fruehauf Account is Not Sufficient in Form to Prevent an Assignment of Monies Becoming Due Under the Contract.

ARGUMENT.

A. Appellee Is Entitled to the Fruehauf and Com-Air Accounts Receivable as Against Appellant-Trustee in Bankruptcy.

1. Under Section 70c of the Bankruptcy Act, the Trustee in Bankruptcy Gets Only Such Rights to the Accounts as an Attaching Creditor of the Bankrupt Might Have Been Able to Obtain on the Date of Bankruptcy.

Brief quotations from the two leading treatises on the law of bankruptcy should suffice to establish this proposition, since Appellant hardly seems to deny it.

In 3 Remington on Bankruptcy, pages 554-555, the author states:

> "The rights conferred on the trustee by the last sentence of §70(c) of the Act are not dependent upon rights held by any existing creditor, but are those of an 'ideal' creditor. He can rely on any of the rights or powers of such a creditor under applicable state law, notwithstanding no existing creditor had them at date of bankruptcy and diligent use of the imagination and close figuring are required to work out even a mythical creditor who would have had such rights. *But if the trustee is unable, even with such assistance from the Bankruptcy Act, to make out a situation under which a creditor governed by such law could hold the transaction for naught, the possibilities under §70(c) are exhausted.* That provision does not go so far as to make the trustee a bona fide purchaser." (Emphasis added.)

4 Collier on Bankruptcy, pages 1263-1265, puts the same proposition in this manner:

> "Therefore, the trustee's powers, in every case governed by this portion of §70c, are those which the state law would allow to a supposed creditor of the

bankrupt who had, at the date of bankruptcy, completed the legal (or equitable) processes for perfection of a lien upon all of the property in either the bankrupt's or the court's possession or control . . . *But the extent of the trustee's rights, remedies, and powers as a lien creditor are measured by the substantive law of the jurisdiction governing the property in question.* It is not for the state law to determine what rights conferred on lien creditors are transferred to the trustee under the Act. *Nor, on the other hand, does §70c confer on the trustee any greater rights than those accorded by the applicable law to a creditor holding a lien by legal or equitable proceedings.* These are fundamental concepts in the application of the strong-arm clause of §70c which must not be forgotten." (Emphasis added.)

Despite the foregoing, Appellant perhaps implies that a Trustee in Bankruptcy obtains greater powers under Section 70c than are conferred upon creditors by applicable state law. (Op. Br. pp. 10, 7.) None of the cases cited, however, nor any others would sustain such a proposition.[2] As plainly demonstrated above, to prevail under Section 70c the Trustee must show that a creditor of the bankrupt—albeit a hypothetical one—could have successfully attacked the transfer in question under the state

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[2]The cases cited by Appellant, perhaps for the proposition that Section 70c gives the Trustee more powers than a hypothetical creditor would possess under state law, do not so hold. (Op. Br. pp. 10, 7.) In *Sampsell v. Straub,* 194 F. 2d 228 (C. A. 9, 1951), and *England v. Sanderson,* 236 F. 2d 641 (C. A. 9, 1956), the Trustee prevailed over the bankrupt's claim to a homestead exemption because a hypothetical judgment lien creditor could have obtained rights in the homestead superior to those of the bankrupt at the time of bankruptcy. In *Constance v. Harvey,* 215 F. 2d 571 (C. A. 2, 1954), the Trustee was permitted to invalidate a tardily recorded chattel mortgage for the reason that a hypothetical creditor who had extended credit before the recordation could have prevailed

law on the day of bankruptcy. The authorities referred to by Appellant do not contain the slightest implication to the contrary.

2. Under California Law, a Creditor of the Bankrupt Who, on the Date of Bankruptcy, Garnished or Levied an Attachment on the Fruehauf and Com-Air Accounts, Would Have Obtained No Greater Rights Thereto Than the Bankrupt Itself Had.

It is almost axiomatic in California that, absent some special statute conferring greater rights, a creditor who levies on property "stands in the shoes of the debtor," the lien attaching only to the debtor's interest at the time of levy. As the California Supreme Court in *Kinnison v. Guaranty Liquidating Corp.*, 18 Cal. 2d 256, 259-260 (1941), stated:

> "It is the general rule that an attaching creditor, seeking to subject the property of a debtor to the payment of his debt, obtains a lien only upon the title or interest which the debtor has in the particular property at the time of the levy. Thus, if all the title and interest of the debtor has been assigned to a third person, the attaching creditor gets nothing by virtue of his levy."

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over the mortgagee on the date of bankruptcy. Appellant's citation of *United States v. Elland*, 223 F. 2d 118 (C. A. 4, 1955), is even more puzzling, inasmuch as Section 70c was not there involved at all. The question was whether the Director of Internal Revenue had sufficient "possession" under his levy on certain accounts receivable to enable him to avoid postponement of his tax lien under Section 67c(1) of the Bankruptcy Act. And the Court held the Government's rights to be superior to the Trustee. Likewise, *Arnold v. Phillips*, 117 F. 2d 497 (C. A. 5, 1941), did not involve Section 70c: rather, it was concerned with the Bankruptcy Court's power to subordinate claims of corporate insiders to those of other creditors, where equitable considerations so required.

Haupt v. Charlie's Kosher Market, 17 Cal. 2d 843 (1941), involved competition between the lien of an attaching creditor upon a tort judgment and the equitable lien upon the judgment in favor of the debtor's attorney arising out of his contingent fee agreement. The decision is directly in point since the tort cause of action was non-assignable under California law at the time the attorney's lien was created by the contract. The Court ruled that the attaching creditor's rights were junior to the equity in favor of the attorney:

> "In such a case it has been held that the agreement for a lien is decisive as to its existence and amount, and it constitutes a valid equitable assignment of the judgment *pro tanto,* and created a lien upon the specific fund notwithstanding that the action in which the judgment was obtained was on a cause of action for tort in itself unassignable . . .
>
> "It is settled that an attachment lien reaches only the interest of the debtor in the attached property and is therefore subject to prior equities against the debtor." (17 Cal. 2d at 845-846.)

In 6 Cal. Jur. 2d, Attachment and Garnishment, Sec. 130, the law is summarized as follows:

> "An attaching creditor obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy and where no actual interest is shown he gets nothing by virtue of his levy. The lien attaches to the real and not the apparent interest of the debtor . . .
>
> "The attachment lien is subject to prior equities against the debtor, so that the claim of an attaching creditor may be defeated by proof of an equitable assignment of the debtor's interest, or by a prior unrecorded conveyance of the debtor's real property.

> An attaching creditor does not have the status of a bona fide purchaser for value, and the fact that he has no knowledge at the time the attachment is levied that corporate stock attached has been theretofore pledged does not make the attachment lien prior in time or right to the lien of the pledgee; and when attaching property subject to a mortgage, whether recorded or not, he takes only the interest the mortgagor had at the time of the levy.
>
> "Where a statute declares a previous transfer of title void as to creditors of the tranferor, there is an exception to the general rule as to the inefficacy of an attachment to reach an interest of which the debtor has divested himself. The exception is founded on the theory that, as to the creditor, there is no transfer at all, and the title to the property, for his benefit, remains in the debtor, notwithstanding a previous legal transfer good as against all others."

A large number of additional authorities to the same effect are collected in McKinney, New California Digest, Attachment, Sec. 58.

See also:

1 Witkin, California Procedure, p. 913;
3 Witkin, California Procedure, p. 2006;
Code Civ. Proc., Secs. 698, 699.

As noted above, there are some instances where, by virtue of a special statute, an attaching creditor in California can obtain greater rights to certain property than the debtor himself had. Thus, for example, even though a given transfer or encumbrance is valid as between a debtor and his transferee, a subsequent attaching creditor will normally prevail in cases of an unrecorded or belatedly recorded chattel mortgage (Civ. Code, Sec. 2957); where

there has been a failure to comply with the requirements of the Bulk Sales Law (Civ. Code, Sec. 3440.1); where personal property has been transferred without immediate delivery and actual change of possession (Civ. Code, Sec. 3440); where accounts receivable have been assigned without filing of the requisite notice (Civ. Code, Sec. 3018); where a fraudulent transfer has been made (Civ. Code, Sec. 3439.09); and in cases of certain defective trust receipt transactions. (Civ. Code, Sec. 3016.4.)

But there is no such special statute conferring additional rights on creditors which is applicable in the present case. As was expressly found, Appellee did properly comply with the statutory requirements concerning the filing of the notice of assignment of accounts receivable. [Tr. Case No. 16042, p. 56.] Therefore, the general rule that an attaching creditor gets no greater rights than his debtor had is here controlling.

3. **Regardless of the Enforceability of the Non-assignment Provisions by the Obligors, the Assignments of the Fruehauf and Com-Air Accounts Were Valid as Between the Assignor and Assignee.**

Thus, prior to bankruptcy, the assignments transferred all the bankrupt's rights in the accounts to Appellee, and left no interest in the bankrupt which could be reached by an attaching creditor on the date of bankruptcy. On this date, Appellee at the very least had the equitable rights to the accounts as against the bankrupt, even if it be conceded for present purposes that Fruehauf and Com-Air could insist upon making payment directly to the bankrupt rather than to its assignee.

The Referee at first held that a transfer made in violation of a contractual provision against assignment was not only invalid as against the obligor, but also was void

as between the assignor and assignee. In reversing, the District Judge recognized that the California Supreme Court has declared the applicable state law to be the contrary. [Tr. Case No. 16042, pp. 50-51.] The leading case is *Johnston v. Landucci*, 21 Cal. 2d 63 (1942), involving the assignment of certain contract rights. At page 67, the Court framed one of the questions for decision as follows:

> "Does a provision prohibiting assignment without consent of the seller . . . prevent the interest of the buyer-assignor passing to an assignee, where such consent is not secured?"

The Court held that the assignor's interest did pass to the assignee even though transferred in violation of the stipulation against assignment. At pages 67-68 it was stated:

> "Although there are no cases directly in point in California, the overwhelming weight of authority in other jurisdictions is to the effect that provisions against assignment . . . are for the benefit of the vendor only, and in no way affect the validity of an assignment without consent as between the assignor and assignee. In other words, the interest of the assignor in the contract passes to the assignee, subject to the rights of the original seller. This is the rule set forth in the Restatement of the Law of Contracts. Section 176 reads as follows: 'A prohibition in a contract of the assignment of rights thereunder is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor by the assignment or the obligor from discharging his duty under the contract in any way permissible if there were no such prohibition.'
>
> "The rule that such provisions are for the benefit of the seller and in no way affect the validity of an

assignment as between the assignor and assignee is the rule adopted by the United States Supreme Court. (*Portuguese-American Bank v. Welles*, 242 U. S. 7 [37 S. Ct. 3, 61 L. Ed. 116]), and is the rule approved by Williston in his work on Contracts (Williston on Contracts, Revised ed., vol. II, §422). Although there are no cases in California dealing directly with the assignment of choses in action in violation of a provision against assignment, there are several cases which hold that the prohibition in a lease against assignment is for the benefit of the lessor, and that an assignment without consent passes the interest of the assignor to the assignee."

The *Portuguese-American Bank* case, *supra*, relied upon by the Court in *Johnston v. Landucci*, arose in California and involved an interpretation of the law of this state. The contract in question contained a provision against assignment of any rights or monies due thereunder except upon the consent of the California Board of Public Works. Without such consent, a bankrupt assigned as security to the bank certain funds due under the contract. Mr. Justice Holmes, writing for the Court, held that the transfer in violation of the non-assignability clause was good at least as between assignor and assignee, and that the bank was entitled to the funds as against a creditor of the bankrupt who attempted to assert mechanic lien rights to the funds after the assignment.

In Williston on Contracts, Vol. II, Sec. 422, page 1218 (Rev. Ed., 1936), cited by the California Supreme Court in *Johnston v. Landucci*, it is said:

"A prohibition of assignment or a condition restricting performance of the debtor's obligation to the original promisee is intended for the benefit of the debtor and cannot affect the legal or equitable

rights of the assignor and assignee as between themselves. Accordingly, if the assignor should collect the assigned claim he would be bound to pay what he had collected to the assignee."

More recently, in 1946, the District Court of Appeal followed *Johnston v. Landucci* in the case of *O'Neill v. O'Malley,* 75 Cal. App. 2d 821. The *O'Neill* case involved the following fact situation: A Husband purchased land from the California Veterans' Welfare Board on a title retaining contract providing against assignment without the Board's consent. With the Board's consent, Husband assigned the contract to Wife as her separate property. Thereafter, without the Board's consent, Wife assigned the contract to herself and Husband as joint tenants. Wife died, and the question was whether the rights under the contract belonged to the Wife's estate—on the ground that the reassignment without the Board's consent was invalid—or to the Husband as the surviving joint tenant. The Board refused to recognize the reassignment pending a court resolution of the controversy.

The Court held that the reassignment was valid as between the assignor (Wife) and assignee (Husband-Wife) despite lack of the Board's consent, and that the Husband accordingly was entitled to a decree quieting his title as against the Wife's estate. The rationale of the decision was as follows:

"This brings us to the question as to whether this assignment was invalid because the consent of the board was not secured. Had the original contract of purchase been between private parties and contained the identical provision above quoted against assignment without consent of the seller, there can be no doubt at all that an assignment by the vendee

without consent of the vendor would as between the parties and those claiming under them be valid. This exact problem has recently been reviewed by the Supreme Court in *Johnston v. Landucci,* 21 Cal. 2d 63.

. . .

"It is quite clear, if the same rule applies between the state and an individual as applies between individuals, that, under the rule of the Landucci case the assignment here between the husband and wife creating the joint tenancy was valid between the parties even though the consent of the board was not secured.

. . .

"There can be no doubt at all that under these sections there is a limitation against assignment written into every board contract by operation of law even if not expressed. But it is quite clear that if private individuals incorporated into their contract the exact language of the two statutes under the Landucci case, such language would be interpreted to be for the sole benefit of the vendor and would in no way affect the validity of the assignment between the assignor and assignee. It would seem that the language when used in a statute should not be given a different meaning. What appellants have overlooked is that there is a strong public policy in favor of the free transferability of property, and that such provisions have quite uniformly been interpreted as being for the sole benefit of the vendor and do not affect the rights *inter se* of the assignor and assignee." (75 Cal. App. 2d at 824-827.)

Three years later, in *Rosenthal v. Landau,* 90 Cal. App. 2d 310 (1949), the District Court of Appeal again followed *Johnston v. Landucci* on substantially the same facts as were involved in the *O'Neill* case.

See also opinion of the Attorney General of California, No. 55-10, Feb. 4, 1955, 25 Ops. Cal. Atty. Gen. 101 at 102.

The foregoing California authorities are in accord with the precedents from other jurisdictions. In 148 A. L. R. 1361, 1362, the editors state:

> "As to the general effect of a prohibition against assignment in a land contract or lease without the consent or approbation of the vendor or lessor, it has been generally stated that such a provision is for the benefit of the vendor or lessor, that only he, or those claiming through him, can take advantage of such a provision, and that if he does not choose to do so, no one else can." (Citing many cases from a number of jurisdictions.)

In rejecting the foregoing authorities, the Referee cited *Parkinson v. Caldwell,* 126 Cal. App. 2d 548 (1954), the only California case now seriously relied upon by Appellant. But that decision, arising out of a rather complicated and usual fact situation, would appear distinguishable.

In *Parkinson,* an Uncle was trustee of a testamentary trust in which he had the income for life with remainder to his Nephew. To settle a will contest, Uncle and Nephew agreed that as trustee, Uncle would execute a note for approximately $14,000.00 to himself as an individual, secured by trust deed on certain trust property. The agreement further provided against Uncle's transferring the note without Nephew's consent. In violation of this provision, Uncle pledged the note and trust deed to secure an obligation which he personally owed to Lester.

Upon Uncle's death, Nephew, as remainderman, posted with the trustee under the trust deed the amount owing by the trust on the note, so as to clear the lien of the en-

cumbrance from the trust property to which Nephew was now entitled. The suit was then brought by Uncle's administrator to determine the rights to the money put up by Nephew.

Lester claimed the money as owner of the note, being Uncle's transferee. Uncle's administrator (Plaintiff) contended that the fund should be paid to him because the pledge by Uncle to Lester in violation of the non-transfer provision was ineffective. Nephew joined in this contention, praying that the money be paid to Uncle's administrator so that it could be used to pay the obligations of Uncle's estate. Uncle, who had died insolvent, had failed as life tenant to pay some $10,000.00 of taxes upon the trust; as a result, his estate was liable to Nephew as remainderman for this amount.

The court enforced the non-assignability provision, holding for the Plaintiff and the Nephew. Although, as between Plaintiff (Uncle's administrator) and Lester, the case would appear to involve the enforceability of the clause as between assignor and assignee, actually, as seen above, the dispute was one between Lester and the Nephew as sole remaining interested party in the trust; that is to say, the real question was whether a provision against assignment could be enforced against the assignee by Nephew who, as remainderman, was in effect in the position of the obligor on the trust's notes.

That this was the basis for the court's holding appears from its discussion of the unjust enrichment argument, 126 Cal. App. 2d at 553-554. The Nephew was held to be the one for whose benefit the non-transfer provision was

made, the purpose being to insure that the trust paid its note to the Uncle or his estate so that funds would exist to discharge any obligations which Uncle, as life tenant, might have incurred to Nephew, as remainderman. Especially important in this connection is the court's suggestion at page 553 that if Nephew were not involved in the suit, and the dispute were solely one between the assignor (Uncle or his estate) and assignee (appellant Lester), enforcement of the non-assignment clause might result in an unjust enrichment requiring a different holding.

As thus viewed, *Parkinson* is not inconsistent with the other authorities cited above. The decision heavily relied upon by the court in *Parkinson v. Caldwell,* and now urged by Appellant, was that of the New York Court of Appeals in *Allhusen v. Caristo Construction Co.,* 303 N. Y. 46, 103 N. E. 2d 891. The *Allhusen* case held that the obligor of a contractual debt could enforce the non-assignability provision in a suit against him by the assignee (or one claiming through the assignee). The enforceability of the clause as between assignor and assignee was neither involved nor decided. Similarly, Appellant's Brief quotes the treatise writers out of context (Op. Br. p. 13), for the quotations refer to the enforceability of the prohibitory clause as between obligor and assignee, not as between assignor and assignee.

For the purpose of the present argument, it may be conceded that Fruehauf and Com-Air, the obligors of the accounts receivable, can enforce the non-assignability clauses as against Appellee, the assignee. All that need be established here, however, is that as the Supreme Court

has held, the assignments were valid as between the bankrupt-assignor and Appellee, its assignee; or, in other words, that if the obligors insisted upon paying the accounts directly to the bankrupt, Appellee has the rights as against the bankrupt to the monies thus paid.[3]

Unlike *Parkinson,* enforcement of the stipulation against assignment in the present case would result in an unjust enrichment to the bankrupt or its estate. Appellee, prior to bankruptcy, purchased from and paid the bankrupt for the Fruehauf and Com-Air accounts. A holding which would permit the Trustee, the bankrupt's successor in interest, to collect again from the obligors and keep the monies would, as against Appellee, result in an unjust enrichment of the most obvious sort.

Assuming that the foregoing analysis of *Parkinson v. Caldwell* is incorrect, that the case, as the Referee at first concluded and Appellant now urges, is inconsistent with the authorities here relied upon by Appellee, nevertheless the District Judge correctly held that such an opinion of the District Court of Appeal could not overrule the Supreme Court's previous decision in *Johnston v. Landucci, supra.*[4] *Parkinson* cannot be controlling on the question of the validity of an assignment *as between assignor and assignee,* or their successors in interest, so long as *Johnston v.*

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[3]Whether the obligors will insist on paying the Trustee rather than Appellee is now academic in this case, since the monies have actually been paid in part to Appellant and in part to Appellee, with the understanding that an adjustment shall be made as between these parties in accordance with the final decision of this Court.

[4]The Referee would have followed *Johnston v. Landucci* and ruled for Appellee, but for the *Parkinson* case. [See Referee's Supplemental Memorandum, Tr. case no. 16042, p. 28.] Oddly enough, however, he believed that the most recent California case should control, even though it was an opinion of a court lower than the one which had rendered the earlier decision.

Landucci remains the law. There can be no distinguishing the two cases on the ground that the former involved a chose in action while the latter did not. The note and trust deed in *Parkinson* are hardly more of a "chose in action" than was the land purchase contract in *Landucci.* Certainly, the Supreme Court considered the land purchase contract a "chose in action" for the purpose of the *Landucci* decision. (See 21 Cal. 2d at 68.) And *Portuguese-American Bank v. Welles,* 242 U. S. 7, followed by the California Supreme Court in *Landucci,* involved an account receivable just as the present case does.

It should be noted, finally, that the District Court of Appeal in *Parkinson* did not in any way cite or refer to the Supreme Court's *Landucci* decision, nor to *O'Neill v. O'Malley* and *Rosenthal v. Landau, supra,* decisions of a coordinate California appellate court holding valid as between assignor and assignee an assignment in violation of a prohibitory clause. These authorities were not cited in the briefs filed in *Parkinson* and apparently were not otherwise called to the court's attention. For this reason, if for no other, it should not be inferred that the *Parkinson* case undermines the validity of the earlier decisions.

Appellee's position, above set forth in this section of its brief, can be tested in another way. To prevail, as seen above, Appellant must and does contend that the assignments in question were void even as between assignor and assignee. But if this were true, the bankrupt would have still owned the Fruehauf and Com-Air accounts at the time of bankruptcy. Accordingly, Appellant-Trustee would have obtained title thereto under Sections 70a(5) and 70a(6) of the Bankruptcy Act, 11 U. S. C., Secs. 110a(5) and 110a(6), and would have had no need to rely on a lien creditor's rights under Section 70c. Significantly, however, Appellant has never asserted the

bankrupt's "title" to the accounts, as distinguished from his attempt to reach them under a Trustee's Section 70c avoiding power. Any bald assertion of title would have exposed more quickly the fallacy of Appellant's argument.

B. The Provision Against Assignment of the Fruehauf Account Is Not Sufficient in Form to Prevent an Assignment of Monies Coming Due Under the Contract.

The Fruehauf contract, unlike Com-Air's, provided generally against assignment but did not prohibit in express terms the assignment of monies due or to become due thereunder. [See Tr. Case No. 16042, p. 56.] Because of California's general public policy in favor of free transferability of all kinds of property, Civil Code, Section 1044, the courts have strictly construed stipulations against assignment. Thus, even as between obligor and assignee, it has been held that such provisions do not prevent an assignment of monies owing under a contract, though the contract itself be non-assignable. In *Trubowitch v. Riverbank Canning Co.,* 30 Cal. 2d 335, 339-340 (1947), the Supreme Court said:

> "It is established that a provision in a contract or a rule of law against assignment does not preclude the assignment of money due or to become due under the contract (*Butler v. San Francisco Gas etc. Co.,* 168 Cal. 32, 41 [141 P. 818]; *Taylor v. Black Diamond Coal Co.,* 86 Cal. 589, 590 [25 P. 51]; *Dixon-Reo Co. v. Horton Motor Co.,* 49 N. D. 304 [191 N. W. 780]; see 76 A. L. R. 1307; 2 Williston, Contracts, rev. ed., §422), or of money damages for the breach of the contract."

And at page 344:

> " 'Where a bilateral contract in terms forbids assignment, it becomes a matter of interpretation as to what is meant. Is it intended that a duty under the contract shall not be delegated, or is it intended that a right shall not be assigned, or are both prohibitions intended? (2 Williston, Contracts, rev. ed., 1217). Even if it is assumed that the prohibition against assignments relates to rights rather than duties, it does not necessarily apply to all claims under the contract or to all transfers of the contract rights. It is established that in the absence of language to the contrary in the contract, a provision against assignment does not govern claims for money due or claims for money damages for non-performance. . . ."

Similarly, in *Butler v. San Francisco Gas etc. Co.*, 168 Cal. 32, 41 (1914), the Court stated:

> "The mere assignment of moneys due or to become due, although the contract may not be assigned, is held not to be an assignment of the contract."

5 Cal. Jur. 2d, Assignments, Sec. 13, pages 286-287, summarizes the law in this respect as follows:

> "As a broad general rule, the right to receive money due or to become due under a contract may be assigned, though the contract itself is by its terms declared to be non-assignable, or is non-assignable because it involves personal skill or confidence."

It is submitted, therefore, that Appellee is entitled in any event to the monies owing on the Fruehauf accounts receivable.

Conclusion.

Wherefore, Appellee prays:

1. That the Order of the District Judge, dated September 23, 1958, appealed from in case No. 16228, be affirmed.

2. That the appeal from the Order of the District Judge, dated March 28, 1958, constituting case No. 16042, be dismissed, for the reason that the said Order is merely an interlocutory one in a "controversy arising in a proceeding in bankruptcy."

3. That Appellee recover of Appellant its costs on these appeals.

Respectfully submitted,

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